92-1727

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MADERA IRRIGATION DISTRICT
Petitioner

vs.

LAWRENCE F. HANCOCK, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals For The Ninth Circuit

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8 pp

I.
THE QUESTIONS PRESENTED FOR REVIEW:

In 1939 Petitioner, pursuant to a contract with the United States, conveyed its Friant Dam site and its rights to divert water from the San Joaquin River to the United States to be used in the construction of the Central Valley Project in return for a promise by the United States to deliver to Petitioner a permanent supply of water from the Project pursuant to successive Water Service Contracts at a price no higher than that charged to other Friant contractors:

1. Did an Act of Congress adopted in 1986 requiring Petitioner to pay an additional $5,200,000.00 for water delivered under the first 40 year Water Service Contract over and above the contractual maximum rate set forth therein, as a condition precedent to the exercise by Petitioner of its contractual right of continued renewals of Water Service Contracts, deprive Petitioner of vested rights under the 5th Amendment of the Constitution?

2. Did the Congressional Act requiring Petitioner to pay $5,200,000.00 more than other C.V.P. Friant Contracts for water to be delivered under a renewed Water Service Contract deprive Petitioner of vested rights under the 5th Amendment of the Constitution when Petitioner's contract with the United States provided that on renewal Petitioner would not be required to pay more for water than other Friant Contractors?

3. Did a reservation by the Secretary of Interior of a unilateral right to modify the terms of a renewal contract violate Petitioner's contractual right of renewal under the 5th Amendment of the Constitution?

II.

THE PARTIES TO THE PROCEEDING

MADERA IRRIGATION DISTRICT, Plaintiff, Appellant and Petitioner

LAWRENCE F. HANCOCK, as Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; DENNIS UNDERWOOD, as Commissioner of Reclamation, United States Department of the Interior; and MANUEL LUJAN, JR., as Secretary of the Interior of the United States of America, Defendants- Respondents;

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFOR- NIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTS FISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIAT- ION; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDOBON SOCIETY, INC. UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION and NATIONAL AUDOBON SOCIETY, Intervenors-Respondents.

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V.

THE OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS DELIVERED BY OTHER COURTS

1. The Amended Opinion of the United States Court of Appeals for the Ninth Circuit has not as yet been published. It is attached hereto as Appendix A.

2. The Opinion of the District Court is unpublished, and is attached hereto as Appendix B.

3. The Judgment appealed from is attached hereto as Appendix C.

VI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of entry of the amended judgment and decree of the United States Court of Appeals for the Ninth Circuit is March 8, 1993.

2. The date of the order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Bank was March 29, 1993.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment and decree in question by writ of certiorari is 28 U.S.C. § 1254.

VII.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Fifth Amendment of the Constitution of the United States.[1]

2. 43 U.S.C. § 390uu[2]

3. Section 106 of Pub. L. No. 96-546[3]

VIII.

STATEMENT OF THE CASE

A. THE FACTUAL BACKGROUND

1. The District:

Madera Irrigation District (hereinafter "Madera") was formed in 1922 to obtain a surface water supply from the San Joaquin River to supplement a depleting ground water supply. By 1939 it had adopted a plan to construct a dam at Friant and had acquired, through litigation, important rights to divert the flows of the river to supply its landowners with an adequate supply of irrigation water.

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[1] See APENDIX D: Page 1,

[2] See APENDIX D: Page 1.

[3] See APENDIX D: Page 1.

2. The 1939 Contract:

In 1935 Congress authorized construction of the Central Valley Project which included a dam at Friant. To facilitate construction of the Friant Dam and Reservoir as part of the Central Valley Project, Madera entered into a contract on May 24, 1939, under which it sold to the United States its dam site and water rights. The contract recognized Madera's plans to construct Friant Dam to provide needed water for the District. It provided in part:

> "the United States recognizes that the District, in contracting to transfer and surrender to the United States its properties and rights hereinabove referred to is relying upon the District being entitled to purchase a supplemental supply of water from Friant Dam and Reservoir . . . and the United States desires to give the District assurance that . . . the District shall be given opportunity to purchase . . . such a water supply . . . and the District desires to have it understood that it contemplates contracting hereafter for such a water supply."

The contract provided that if Friant Dam and Madera Canal to carry the water to Madera was not constructed that the dam site and water rights would be returned to Madera.

Madera was given the right to purchase 270,000 acre feet of Project water of which 120,00 acre feet would be Class 1 water (a firm supply) and the remaining amount would be Class 2 water (an undependable and variable supply from none to 150,000 acre feet).

Moreover, although the price of the water could not be determined at the time of the contract's execu-

tion, the government agreed that it would not exceed that charged other purchasers of Friant water.

Subsequent to execution of the 1939 Contract, the Chowchilla Water District was formed from land withdrawn from Madera. On August 24, 1949, with the consent of the United States, a partial assignment of the 1939 Contract was made to that district. Chowchilla entered into a water service contract in 1950.

3. The 1951 Water Service Contract:

On May 14, 1951, Madera and the United States entered into a water service contract and for construction of a distribution system. The 1951 Contract acknowledges that the parties desire to provide for the continued delivery of water, but added a provision that:

> The United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described subject to the terms and conditions set forth in the 1939 contract.

The 1951 contract fixed the price to be announced each year by the Secretary

> "but in no event shall the rates so announced be in excess of $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water."

The 1951 Contract provides for a right of renewal upon its expiration on May 14, 1992, with terms

entitling the district to the rights conferred upon it by the 1939 Contract

4. Renewal Negotiations:

As the end of the forty year term approached, Madera, Chowchilla and the Bureau began negotiation of the renewals. The United States insisted on two provisions in the contract:

> The first was the requirement that the Districts pay the difference between the $3.50 and $1.50 per acre foot set forth in, and paid under, Chowchilla's 1950 contract and Madera's 1951 contract and what the Bureau of Reclamation had computed in 1988 to be the Districts' share of the operation and maintenance costs of the Project during the 40 years covered by the 1951 contract. This amount is currently in excess of $5,200,000.00 for Madera.
>
> The second was Article 14 of the proposed contract, pursuant to which the Districts were required to agree that an EIS be prepared under the National Environmental Protection Act (NEPA) and further consultation be done under the Endangered Species Act (ESA) and gave the Secretary the unilateral right thereafter to amend the contract provisions without the consent of the Districts.

Madera and Chowchilla claimed that the two provisions in the proposed new contract violated their rights under the previous contracts:

> First that the imposition of the O&M Deficit provisions violated their constitutionally protected right under the 1950 and 1951 con-

tracts to pay no more than $3.50 and $1.50 for water delivered thereunder.

Second that the imposition of the O&M Deficit provisions violated their constitutionally protected right under the 1939 contract to pay no more than other Friant contractors for water delivered under the renewal contract.

Third that the computation of the O&M Deficit was improperly made.

Fourth that the reservation by the Secretary of the unilateral right to modify the terms of the contract rendered it a nullity and violated the Districts' constitutionally protected right to obtain a renewal contract.

5. The Present Action:

The foregoing created an impasse and Madera and Chowchilla filed an action for Declaratory Relief in the District Court. The Court allowed intervention by the Intervenors and both the United States and the Intervenors filed motions to dismiss for failure to state a claim. Their motions were granted and a judgment of dismissal entered.

Chowchilla, whose 1950 contract had expired, was required to file a dismissal as a condition imposed by the Secretary of Interior to receiving continued delivery of Project water.

Appeal was made by Madera to the 9th Circuit which affirmed the District Court. Motions for Rehearing were denied and this Petition followed.

B. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

1. 43 U.S.C. § 390uu[4] provides authority to commence an action against the United States involving Reclamation Contracts in the District Court.

IX.
ARGUMENT

A. INTRODUCTION:

1. The Constitutional Issue:

The O&M Deficit issue in this case brings before this Court the balance between protecting vested contract rights under the 5th Amendment and the sovereign power of Congress to enact laws.

At the outset Petitioner recognizes that in promoting the general welfare Congress can pass laws which will affect contractual rights of persons who have entered into contracts with the United States. NEPA and ESA are examples of such acts and Petitioner does not claim to be insulated from the provisions thereof.

Section 106 of Pub. L. No. 96-546[5] under which the O&M Deficit charges are mandated is not an act to promote the general welfare, its sole purpose is to raise money for the United States.

This distinction was not observed in the opinions

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[4] See APENDIX D: page 1.

[5] See Apendix D page 1.

of either the District or Circuit courts although it has long been recognized by this Court. In *Lynch v. United States*, 292 US 571, 78 L Ed 1434, 54S Ct 840 (1934) the Court stated at 292 US 579:

> "...Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy but an act of repudiation."

This Court in *United States v. Larionoff*, 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150 (1977) was construing a statute affecting the pay of service men. Congress had enacted VRB which promised bonuses to service men who extended their service. In 1974 it repealed the act. The Court stated at 431 US page 879:

> "When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect... Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, *and constitutionally could do so*, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of Course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces,

> even if that reduction deprived members of benefits they had expected to be able to earn. (citations) *It is quite a different matter, however for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light.* (citing *Lynch* supra and *Perry* supra) In view of these problems, we would not lightly conclude in the absence of a clear expression of congressional intent that in amending (VRB) and establishing a new bonus system, Congress intended to affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's." (emphasis added)

As will be pointed out in discussing the conflict in the decision by the 9th Circuit with its decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992) the court in *Alpine* did recognize the difference in applying Constitutional Fifth Amendment protection to acts of Congress to promote the general welfare and acts of Congress to raise money.

B. MADERA HAS A VESTED RIGHT OF RENEWAL OF ITS WATER SERVICE CONTRACT WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT.

1. The Contract Terms:

Madera transferred its dam site and water rights under a contractual promise from the United States to

a permanent supply of Project water by successive contracts. The 1951 contract provides in part:

> ". . . the District and the United States on May 24, 1939 executed a contract . . . under the terms of which the District . . . became entitled to purchase from Friant Dam and reservoir . . . a permanent supplemental supply of Class 1 and Class 2 water . . ."
>
> ". . . the United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described . . ."

The 1951 Contract amended the 1939 Contract by giving Madera the right to exercise its option to renew its successive water service contracts within six months after the expiration of each succeeding contract.

2. The Circuit Court's Determination:

The Court of Appeals in its Opinion recognized Madera's vested right to renew. After quoting from the 1951 Contract the Circuit Court stated:

> This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested property right to a permanent water supply based on express provisions of its contracts. *Cf: Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1385-86 (9thCir. 1992), (express provisions of contract supported by independent consideration, not merely legislative provisions, create vested

property rights), cert. granted, 113 S. Ct. 490 (1992). The question is not whether its rights exist, but whether they are being violated."[6]

The Circuit Court further recognized that Congress could not retroactively change the price Madera paid for water under the 1951 Contract, stating:

> "When parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the seller bears the risk that its, costs will exceed that ceiling. A government contract supported by consideration to pay a subsidy is legitimate and enforceable. *Cf. Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1383 (9th Cir. 1992), (upholding contracts obligating government to subsidize low income housing rents), cert. granted, 113 S. Ct. 490 (1992). The promise to subsidize if necessary may be an instrument of policy designed to induce people to do things they otherwise would not do, such as transfer water rights and land to the United States, settle in the West and start a farm, or invest in an existing farm and equipment. We will not construe away the unmistakable term establishing a ceiling price in the 1951 contract on the ground that it granted an unintended subsidy."[7]

The Circuit Court determined, however that Madera's rights were not violated, stating:

> "Nevertheless, we conclude that the re-

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[6] APPENDIX A: Page 10.

[7] APPENDIX A: Page 11.

coupment of the operations and maintenance expense does not violate Madera's rights under the 1951 contact. Madera got its water during the forty year term, and need pay no more for the old water than the price to which it agreed. Were it to buy no more water, it would owe no more money for the operations and maintenance expense. The recoupment will be a factor in the price of water under the renewal contract. The price of the new water will be calculated in such a way as to recoup a subsidy previously granted, as though the subsidy were a debt, but the subsidy is not owed like a debt. Madera has no obligation to repay it. The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but Madera could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water.[8]

While we disagree with the Circuit Court's determination that recoupment of the O&M surcharge is a "part of the cost of new water under the renewal contract" in view of the statutory language,[9] such determination is immaterial in deciding whether Madera's constitutionally protected right to renew is violated.

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[8] APPENDIX A: Pages 11-12

[9] Pub. L. No. 99-546 § 106:

"The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract . . ."

In saying that Madera does not have to pay the additional $5,200,000.00 O&M Surcharge on deliveries made under the 1951 Contract if it doesn't renew its contract, the Circuit Court ignores Madera's acknowledged constitutionally protected right of renewal. If Madera is required to pay an additional $5,200,000.00 computed on water delivered and paid for on an agreed maximum price under the 1951 Contract as a condition precedent to renewal, where is the Constitutional protection of the right to renew?

In weighing Madera's rights against Congressional sovereignty to enact laws it must be remembered that the act requiring collection of the O&M Deficit is purely an act to raise additional revenue for the United States, not an act to promote the general welfare.

C. MADERA HAS A VESTED RIGHT FROM ITS 1939 CONTRACT TO PAY NO MORE FOR WATER THAN THE FRIANT CONTRACTORS WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT.

1. The Contract Terms:

The 1939 Contract provides in connection with the price to be paid by Madera for its permanent water supply:

> "It is mutually understood by the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and

Reservoir. "

The 1951 Contract provides:

"Under this Part A [the water service portion of the contract] and under succeeding contracts the rates to be charged to the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir."

Under the terms offered by the United States in the renewal contract, Madera would be required to pay $5,200,000.00 more than other Friant contractors for the same class of water and service from Friant Dam and Reservoir.

2. The Circuit Court's Determination:

The Circuit Court attempts to construe the contract as allowing the United States to charge Madera more than others for the same class of water and service stating:

"The two general principles of avoiding unconstitutionality and construing contracts to preserve sovereign authority nevertheless compel us to reject Madera's argument. 'The contractual words, "for the same . . . service" preserve Congressional authority to require a different charge for different service. Service requiring more expensive operation and maintenance is different from service requiring less expensive operation and maintenance. The equality promised applies to "rates," and the 1951 contract puts rates in section 7, and operation and maintenance cost in a separate section 15, evidently contemplating in section 16 that the irrigation dis-

trict would take over operation and maintenance. This suggests that the parties did not intend that Madera's operation and maintenance cost could not exceed that of other districts."

The Circuit Court misconstrues the facts and the 1951 Contract. Gravelly Ford Water District takes its Class 2 water supply from the same outlet on Madera Canal as Madera and uses Madera's distribution system to carry the water to its boundaries, yet Gravelly Ford is charged no O&M Deficit. How then can it be said this is a different kind of service or cost of operation from Madera's Class 2 supply which is burdened by the O&M Surcharge?

The Circuit Court misconstrues the 1951 Contract. It compares the "rates" in Section 7 with "operation and maintenance charges" in Section 15. The 1951 Contract is bifurcated into two parts. Part A is the water service portion of the contract and Part B is the contract for construction by the United States of portions of Madera's local distribution system, the cost of which is repayable over the 40 year term. The reference to operation and maintenance charges in Section 15 relate to charges made if the United States takes over operation and maintenance of the local distribution system upon default by Madera of the provisions of the agreement. It has nothing to do with rates for water service in Section 7.

Madera has no quarrel with the right of the United States to charge higher water service charges under the renewed contracts [Class 1 water has increased from $3.50 to $28.45 per acre foot and Class 2 water from $1.50 to $14.85 per acre foot] in order to pay full O&M costs and capital repayment so that the Project will pay out by 2032. It does object to pay $5,200,000.00 more than its neighboring districts for the

same class of water and the same service when it transferred its dam site and water rights to the United States on the promise that it would not be charged more than other contractors.

D. MADERA'S VESTED RIGHT OF RENEWAL REQUIRES THE UNITED STATES TO OFFER A CONTRACT, NOT A NULLITY.

1. Article 14:

Article 14. [10] of the proposed contract requires Madera to agree to the preparation of an EIS and further ESA consultation and to allow the Secretary thereafter to unilaterally modify the terms of the contract. As the Circuit Court pointed out[11] in another action in the District Court involving the same parties as the present case, the United States and Madera take the position that ESA has been complied with and an EIS is not necessary as a prerequisite to renewal.

2. NEPA and ESA:

Madera does not assert that it is not subject to NEPA and ESA, if a contract is entered into without complying with the provisions of those acts it can be set aside. What Madera objects to in Article 14 is requiring the District to agree to further action which Madera and the United States assert is unnecessary under those Acts and then to agree to unilateral modification of the contract by the Secretary. Madera's Constitutional

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[10] See APPENDIX D: Page 2.

[11] See APENDIX A: Page 19.

right of renewal is to receive a contract, not a nullity. The government cannot reserve to itself an unlimited right to escape its contractual obligations "without rendering its promises illusory and the contract void." *Torncello v. United States*, 681 F.2d 756, 760 (Cl. Ct 1982).

E. THE DECISION IS IN CONFLICT WITH ANOTHER DECISION OF THE 9TH CIRCUIT COURT OF APPEALS.

1. *Alpine Ridge Group v. Kemp*:

In *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992) builders of low cost housing had entered into contracts with HUD which set forth the method of computing future rents. The method set forth therein was one of the two methods allowed in the statute.

After the housing had been completed, HUD determined that the contractual method of calculation was improper and imposed the other method on the builders. They sued and the court ordered the contractual method to be used.

Congress then passed a law which purported to require the builders to use the noncontractual method. The builders sought protection of their contract rights under the 5th Amendment.

The Court in *Alpine Ridge* gave a careful review of the limitations imposed on Congress under the 5th Amendment to abrogate or modify contractual commitments of the United States. It stated at page 1387:

> "For the reasons stated above, we conclude, in accord with *Rainier View*, that the own-

> ers have a vested property interest in formula-based rent adjustments pursuant to their section 8 contracts.
> . . . "Thus, the remaining question is whether Congress' abrogation of the owners' rights by section 801 of the HUD Reform Act violates due process."
>
> "The fact that Congress does not recognize its obligation under the contracts as interpreted by *Rainier View* does not affect the validity of the owner's rights, or Congress' inability to alter them by retroactively amending the underlying statute."

At page 1388:

> "We hold that these cases fall within the scope of *Lynch* and *Perry*, and that through section 801 Congress has *attempted to reduce an obligation in order to save money*. . . . Therefore we hold that section 801 unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment." (Emphasis added)

In *Madera* the issue is a contractual agreement promising a permanent water supply with the right to renew and placing a limit on water charges. These rights are vested in Madera to the same extent that the rental formulas were vested in *Alpine Ridge*. The United States through Congressional action abrogates those rights by placing an additional payment of $5,200,000.00 as a condition precedent to renewal and is attempting to charge more than the limit set in the agreement, solely as a method of increasing dollar returns to the United States. If such action is unconstitutional in *Alpine Ridge* it should be unconstitutional in *Madera*.

2. "Sovereign Power is Retained Unless Surrendered in Unmistakable Terms":

The Circuit Court in its Opinion used as the criteria to measure Madera's constitutional rights whether the United States had "surrendered in unmistakable terms" Congress' power to modify government contracts.

This language comes from *Bowen v. Agencies Opp. To Soc. Sec. Entrapment,* 477 US 41, 91 L.Ed 2d 35, 106 S. Ct. 2390 (1986) in a case involving the Social Security System which the Court called "the Nation's basic social insurance program" and noted that "Congress had expressly reserved the right to alter, amend or repeal any provision of the Act."

The Court observed at page 46 of 91 L Ed 2d:

> **". . . without regard to its source, sovereign power, even when unexercised is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms. Therefore, contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign." (Quoting from *Merrion v. Jacarilla Apach Tribe,* 455 US 130, 148, 71 L Ed 2d 21, 102 S Ct 894 (1982))**

The Court further admonished, however:

> **"Those admonitions take on added force when the arrangement pursuant to which the Government is claimed to have surrendered a sovereign power is one that serves to implement a comprehensive social welfare program affecting**

millions of individuals throughout our nation."

The Court then quoted with approval the decisions which preserved contractual rights and stated at page 48:

> "Appellees nonetheless insist that the termination provisions embodied in the Agreement constituted a valuable property right that was 'taken' when Congress enacted amended §418(g). In the Sinking Fund Cases, the Court did observe that Congress' exercise of the reserved power 'has a limit' in that Congress could not rely on that power to 'take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' 99 US at 720, 25 L Ed 496, 25 L Ed 504. Similarly, other decisions have held that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money. *Perry v. United States,* 294 US at 350-351, 79 L Ed 912, 55 S Ct 432, 95 ALR 1335; See L*ynch v. United States,* 292 US at 576-577, 78 L Ed 1434, 54 S Ct 840."

The Court went on to hold that no property right existed because the Contract language exactly parroted that of the statute which reserved the right to amend.

It would appear, therefore, that the proper reading of *Bowen* is to apply the "surrender in unmistakable terms" test to Congressional action which relates to the general public good. Where, however, the legislation is for the sole purpose of raising more revenue for the United States the "surrender" test should not be applied and contractual obligations which have created vested rights allowed protection under the Fifth

Amendment.

Where the legislation is to save or obtain money the rule stated in *Lynch v. United States*, 292 US 571, 576-77, 54 A Ct 840, 78 L Ed 1434 should be applied:

> **"Congress was free to reduce gratuities deemed excessive but was without power to reduce expenditures by abrogating contractual obligations of the United States"**

CONCLUSION

This case not only presents issues of imperitive importance to Madera, it presents issues of sovereign power to abrogate contractual commitments of the United States which are in need of judicial clarification and certainty. Certiorari should be granted as was granted in *Alpine Ridge Group, supra.*

Dated: April 25, 1993

GREEN, GREEN & RIGBY

By: _____

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